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VII. Forum Non Conveniens

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VII. FORUM NON CONVENIENS*

A. *Introduction to Forum Non Conveniens*

The doctrine of forum non conveniens is a common law principle that gives courts the discretion to decline exercising jurisdiction over certain cases where the underlying principles of justice and convenience favor dismissal. Once a plaintiff files a case in the state or federal courts of the United States, the defendant bears the burden of moving for dismissal on forum non conveniens grounds. To prevail on such a motion, the defendant must show that an adequate alternate forum is available. Once that threshold requirement is satisfied, the defendant must then convince the court that dismissing the suit is in the best interest of the parties and the forums. The assumption is that, in the case of dismissal, the suit will be heard in the alternate forum. Nonetheless, dismissal is a severe measure, and as such, courts give a certain degree of deference to the plaintiff's choice of forum. Generally, the defendant has an uphill battle for dismissal, and the deference that the court gives the plaintiff's choice defines the grade of the hill that the defendant must climb. The more it appears that the plaintiff chose the forum for a legitimate reason such as convenience, the greater the defendant's burden will be in overcoming the presumption in favor of the plaintiff's choice.

The doctrine of forum non conveniens was inconsistently applied until 1947¹ when the United States Supreme Court created a

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1. Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1019 & n.83 (2001) (citing numerous U.S. courts that "struggled to apply" the doctrine of forum non conveniens to cases prior to 1947).

standardized test in *Gulf Oil Corp. v. Gilbert*.² However, the Court waited until 1981 to more fully explain the doctrine in *Piper Aircraft Co. v. Reyno*.³ This chapter sets forth the law of forum non conveniens as defined in the leading case, *Piper*. It then moves on to discuss post-*Piper* cases that revisited the key issues in *Piper* and redefined them. It further explores the role of forum non conveniens in both the federal and state courts today,⁴ and it traces the development of U.S. federal courts' attitudes towards suits brought by foreign plaintiffs in the United States—from subtle caution to an active vigilance for international forum shopping in American courts. In recent decades, the courts began to use forum non conveniens as a weapon in the battle between serving justice and becoming the world's surrogate court.

In *Piper*, the Court tried to find a balance between convenience and justice. Justice is served where a foreign plaintiff could potentially find redress in an alternate court.⁵ That alternate forum and its available remedies, however, do not have to be comparable to those in the United States. Later courts illustrated the qualified nature of this justice. A court will exercise jurisdiction and act as the forum for redress only where it is convenient for the court and the parties, or where dismissal would leave the plaintiff with no forum at all. Otherwise, even a far from perfect alternate forum would satisfy this convenience based standard of justice.

2. 330 U.S. 501 (1947) (crystallizing the doctrine of forum non conveniens and setting forth the balancing of the private and public convenience factors). For further discussion, see *infra* Part VII.B.1.b.ii.

3. 454 U.S. 235 (1981); see also Short, *supra* note 1, at 1021–22 (discussing the three ways in which the Court clarified the doctrine of forum non conveniens). First, the Court held that a plaintiff cannot defeat a motion for forum non conveniens dismissal “merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum.” *Piper*, 454 U.S. at 247. Second, the Court focused on the importance of keeping the doctrine flexible by weighing all factors equally. *Id.* at 249–50. Third, although courts generally presume that a plaintiff chooses a forum for the sake of convenience and thus gives that plaintiff’s choice deference, when the plaintiff or real parties in interest are foreign, the presumption applies with less force. *Id.* at 255.

4. For a description of the law of forum non conveniens in federal courts, see *infra* Part VII.B.1; for a description of the law of forum non conveniens in California courts, see *infra* Part VII.C.4.c.

5. *Piper*, 454 U.S. at 240.

As the walls of the United States' federal and state courtrooms expand overseas, U.S. courts pause to ask whether this country's judiciary should, or whether it is even inclined to, act as the world's forum for redress. The Court in *Piper* was fully aware of the allure of U.S. courts and addressed foreign forum shoppers by giving little deference to their decision to litigate in the United States. Courts in the post-*Piper* era explicitly address forum shopping and continue to define the doctrine of forum non conveniens in various contexts. With each new set of fact patterns and legal questions, however, the courts' application of the doctrine becomes less predictable.⁶ At its inception, forum non conveniens was construed as an "instrument of justice,"⁷ yet, in light of *Piper* and its recent progeny, the pursuit of justice has become a balancing act.

B. Piper

1. *Piper* states the law of federal forum non conveniens

In *Piper*, the United States Supreme Court upheld the trial court's dismissal of a wrongful death action on forum non conveniens grounds.⁸ The real parties in interest who brought the action were surviving family members of the Scottish passengers killed when a U.S. manufactured airplane crashed in Scotland.⁹ The Court held that when a defendant moves to have a suit dismissed on forum non conveniens grounds, a court has discretion to decline jurisdiction.¹⁰ The purpose of this mechanism is to serve the parties' and forum's interests in convenience.¹¹ The consequences of

6. For the factually context specific nature of the doctrine and the flexibility of considerations, see *infra* Part VII.B.2.c and *supra* note 103 and accompanying text. For examples of how courts differ in their application of the doctrine to legal questions, see *infra* Part VII.C.4.b. For a discussion on the inconsistent application of the doctrine of forum non conveniens, see Alan Reed, *To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Stages*, 29 GA. J. INT'L & COMP. L. 31, 105 (2000).

7. *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 554 (1946) (quoting *Rogers v. Guar. Trust Co.*, 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting)).

8. *Piper*, 454 U.S. at 261.

9. *Id.* at 238-39.

10. *Id.* at 257-61.

11. *Id.* at 238-39.

dismissal are severe, however, so courts balance considerations of convenience and justice.¹²

The Court in *Piper* stated the current law of federal forum non conveniens. The Court utilized a two-prong analysis: (1) whether an adequate alternate forum is available; and (2) if so, whether the balancing of the private and public convenience factors weigh heavily in favor of litigation in the alternate forum.¹³ The availability of an adequate alternate forum is a threshold requirement; consequently, if it is not met, dismissal cannot be proper.¹⁴ The defendant, as the moving party, bears the burden of proof on both these matters.¹⁵ Once the defendant has satisfied the threshold requirement by illustrating that an adequate alternate forum is available, the court balances convenience interests.¹⁶ When considering the second prong, courts utilize the balancing test introduced in *Gulf Oil Corp. v. Gilbert*¹⁷ and *Koster v. Lumbermens Mutual Casualty Co.*,¹⁸ which was later reaffirmed in *Piper*.¹⁹ Courts weigh the potential burden of litigation on the parties and on the chosen forum against dismissal.²⁰ The Court in *Gilbert* categorized the convenience factors pertaining to the parties as private interests and those relating to the forum as public interests.²¹ If an adequate alternate forum is available and these private and public interests favor dismissal, the court will grant the motion for dismissal on grounds of forum non conveniens.²²

The court, however, does not conduct its analysis in a vacuum. It conducts its balancing in light of the degree of deference the

12. *E.g., id.* at 254 (holding that where the remedy of an alternative forum is inadequate, "the district court may conclude that dismissal would not be in the interests of justice").

13. *See id.* at 247-52.

14. *Id.* at 254 n.22.

15. *See id.* at 258 ("[O]f course, defendants must provide enough information to enable the District Court to balance the parties' interests.").

16. *See id.* at 247-52.

17. 330 U.S. 501 (1947).

18. 330 U.S. 518 (1947).

19. *Piper*, 454 U.S. at 248-52, 255-56.

20. *Id.* at 255.

21. *Id.* at 241 n.6 (discussing the *Gilbert* decision). For a more detailed discussion of the private and public interest factors, see *infra* Part VII.B.1.b.ii. Hereinafter, these private and public interests in convenience will be referred to as the "Gilbert factors" or simply "convenience factors," interchangeably.

22. *Id.* at 241.

plaintiff's choice of forum deserves. The court's deference for the plaintiff plays a significant role in defining the weight of the defendant's burden in satisfying the second prong.²³ Generally, courts view the plaintiff's choice of forum with great deference.²⁴ Where a plaintiff sues in her home forum, it is presumed that she chose the forum for the sake of convenience.²⁵ The defendant may rebut this presumption, however, and a court may exercise its discretion to dismiss the case where: (1) an alternative forum with jurisdiction over the case exists; and (2) to litigate in the plaintiff's chosen forum would result in "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or where the court's "administrative and legal" concerns make the chosen forum inappropriate.²⁶ The first prong is concerned with justice and ensuring that a plaintiff has a forum for redress while the second prong refers to the private and public interests in convenience discussed above.

a. the measure of a defendant's burden: the degree of deference due a plaintiff's choice of forum

Ordinarily, the plaintiff's choice of forum enjoys a strong presumption in its favor.²⁷ This deference for the plaintiff's choice of forum is grounded in considerations of convenience.²⁸ Thus, the degree of "force" with which the presumption applies depends on the citizenship of the "real parties in interest."²⁹ The defendant may overcome this presumption, however, by showing that a balancing of the private and public interest factors "clearly point[s] towards trial in the alternative forum."³⁰

23. *See id.*

24. *Id.* at 255.

25. *Id.* at 255–56.

26. *Id.* at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

27. *Id.* at 255.

28. *Id.* at 256.

29. *Id.* at 255.

30. *Id.*

i. resident or citizen plaintiffs

The Court in *Piper* approved the district court's rationale in distinguishing between "resident or citizen plaintiffs and foreign plaintiffs."³¹ When a plaintiff chooses the "home forum," an assumption of convenience reasonably follows;³² it is fair to assume that a plaintiff who brings suit in her home forum does so because it is convenient and not for other suspect reasons such as harassment or forum shopping.³³ Thus, a plaintiff's decision to sue in the home forum warrants greater deference.³⁴ Nonetheless, a court will not deny a motion for dismissal on forum non conveniens grounds merely because a plaintiff is suing in the home forum.³⁵ Regardless of whether there is a presumption in favor of the plaintiff's choice of forum, the analysis continues.³⁶

Dismissal can still be proper where the plaintiff is a resident of the United States.³⁷ Though "citizenship and residence are proxies for convenience,"³⁸ even an American plaintiff's selection of the home forum does not receive "dispositive weight."³⁹ Dismissal is not "automatically barred" in such a scenario.⁴⁰ A "real showing of convenience" will solidify the presumption of deference and tip the balance in favor of the plaintiff by increasing the burden on the defendant to show that dismissal is warranted.⁴¹ The weight of the burden on the defendant is determined by the amount of deference the plaintiff's choice of forum deserves.⁴² Where a U.S. resident plaintiff sues in the home forum, the court assumes that the plaintiff chose the forum for the sake of convenience, and as such, the "defendant must satisfy a heavy burden of proof."⁴³ The defendant

31. *Id.* at 255.

32. *Id.* at 255-56.

33. *See id.*

34. *Id.* at 255.

35. *Id.* at 255 n.23.

36. *Id.*

37. *Id.*

38. *Id.* at 256 n.24 (paraphrasing *Pain v. United Techs. Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980)).

39. *Id.* at 255 n.23.

40. *Id.*

41. *Id.* (emphasis added) (quoting *Koster v. Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

42. *See id.* at 255-56.

43. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001).

can overcome that burden, however, by showing that a balancing of private and public interests favors dismissal.⁴⁴ Where a defendant uses the *Gilbert* factors to illustrate that a trial in the chosen forum would impose an undue burden on the defendant or the court, disproportionate to the plaintiff's convenience, dismissal is appropriate.⁴⁵

ii. foreign plaintiffs

In accordance with the doctrine of forum non conveniens and its objective to "ensure that the trial is convenient, a foreign plaintiff's choice [of forum] deserves less deference [than an American plaintiff's]."⁴⁶ It is rational to assume that U.S. plaintiffs choose their home forum for the sake of convenience, but that is not the case when a foreign plaintiff chooses an American jurisdiction.⁴⁷ To the contrary, such suits are counterintuitive in terms of convenience. Consequently, courts are suspicious that a foreign plaintiff's decision to bring suit in the United States is motivated by a search for a jurisdiction with laws that would be the most favorable for the claim.⁴⁸ This rationale is illustrated by the generally consistent decisions made by lower federal courts to allocate less weight to choices made by foreign plaintiffs.⁴⁹

iii. hostility towards foreign plaintiffs utilizing U.S. courts and causes of action

The Court in *Piper* rephrased the earlier holding in *Gilbert* to explicitly address plaintiffs "shopping" for a forum.⁵⁰ It stated that dismissal under forum non conveniens may be "warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable

44. *Piper*, 454 U.S. at 255 n.23.

45. *See id.* at 256.

46. *Id.*

47. *Id.* at 255-56.

48. *See* *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950) ("[S]uit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.").

49. *Id.*

50. *Piper*, 454 U.S. at 249 n.15 & 252 n.19.

law.”⁵¹ The Court in *Piper* was concerned with the question of the “real parties in interest;” the Court viewed the interests of the foreign plaintiffs, the “real” parties in interest in the case, with suspicion and repeatedly referred to Gaynell Reyno, the legal secretary of the attorney filing the suit on behalf of the Scottish plaintiffs.⁵² The Court noted that Reyno, acting as the administratrix of the deceased passengers’ estates, admittedly took advantage of the American courts for the strict liability cause of action available there.⁵³ The absence of strict liability in Scottish courts would have otherwise left the plaintiffs without a viable lawsuit in Scotland where the incident occurred.⁵⁴

b. two step analysis for dismissal

i. adequate alternative forum

The threshold requirement in any forum non conveniens dismissal is the availability of an adequate alternative forum.⁵⁵ Where the defendant does not meet the burden of showing that such a forum is available, dismissal is never appropriate.⁵⁶ The defendant must be “amenable to process” in the alternate forum.⁵⁷ In “rare circumstances” where the remedy available in the other jurisdiction is “clearly unsatisfactory,” the threshold requirement will not be satisfied, and the court will find dismissal improper.⁵⁸ Courts have

51. *Id.* at 249 n.15.

52. *See id.* at 239–40, 242.

53. *Id.* at 240 & n.3.

54. *Id.* at 240. The *Piper* Court stated:

Reyno candidly admits that the action . . . was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent’s relatives. The relatives may sue only for loss of support and society.

Id. at 240 (internal quotation marks omitted).

55. *Id.* at 254 n.22.

56. *Id.*

57. *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947)).

58. *Id.* For a list of the 13 foreign forums that U.S. courts have deemed as adequate alternate forums in 1999, see Tom McNamara, *International Forum Selection and Forum Non Conveniens*, 34 INT’L LAW. 558, 560–61 (2000) (“Canada, Cayman Islands, Columbia, France, Germany, Greece, Hong Kong,

found that forums prohibiting “litigation of the subject matter” disputed do not qualify as adequate alternatives.⁵⁹ This does not mean, however, that the unavailability of a theory for recovery or the possibility of lesser damages will render the alternate forum inadequate.⁶⁰ For example, the Court in *Piper* held that the alternate forum was not inadequate where there was “no danger that [plaintiffs would] be deprived of *any* remedy or treated unfairly.”⁶¹

(a) *change in law*

Often, differences in the laws of the chosen and alternate forums affect the likelihood of recovery in those courts. A plaintiff may argue that the less favorable laws that apply in the alternate forum make that alternate forum inadequate. Such disparities between the laws of the chosen and alternative forums, however, rarely render the alternate forum inadequate.⁶² Despite the Court’s reluctance to give substantial weight to the possibility of an unfavorable change in law, the Court in *Piper* did not hold that the consideration “should *never* be a relevant consideration in a *forum non conveniens* inquiry.”⁶³ The unfavorable change in law may be given substantial weight where the laws of the alternate forum render the available remedy “so clearly inadequate or unsatisfactory that it is no remedy at all.”⁶⁴ Such a showing of clear inadequacy may lead the court to conclude that dismissal would be contrary to the “interests of justice.”⁶⁵

(i) *doctrinal considerations*

Upon review of the alternate forum, courts typically do not give “conclusive or even substantial weight” to plaintiffs’ arguments that the possibility of a change in the applicable substantive law between the forums will adversely affect their causes of action.⁶⁶ When the

Liechtenstein, Netherlands, Pakistan, Peru, Switzerland, and the United Kingdom” (citations omitted)).

59. *Piper*, 454 U.S. at 254 n.22.

60. *See id.* at 255.

61. *Id.* (emphasis added).

62. *Id.* at 250.

63. *Id.* at 254.

64. *Id.*

65. *Id.*

66. *Id.* at 247.

United States Supreme Court reversed the circuit court's decision in *Piper*, the Court reaffirmed its holding in *Canada Malting Co. v. Paterson Steamships, Ltd.*,⁶⁷ which expressly rejected the principle that the mere showing of a less favorable application of law in the alternative forum would enable plaintiffs to defeat a motion to dismiss on forum non conveniens grounds.⁶⁸ Although the doctrine of forum non conveniens was not "crystallized" until fifteen years later in *Gilbert*,⁶⁹ the Court's focus on convenience in *Canada Malting* enabled the decision to endure.⁷⁰ By making convenience the "central focus of the *forum non conveniens* inquiry," it is implicit that an unfavorable change in law cannot, in itself, bar dismissal.⁷¹ Justice and convenience must be balanced. Otherwise, the illusion of justice would compel U.S. courts to burden themselves with inconvenient litigations.⁷²

The Court in *Piper* established the importance of not giving an unfavorable change in law undue weight.⁷³ To do so would result in a windfall, barring dismissal even in cases where trial in the original forum would be "plainly inconvenient."⁷⁴ Plaintiffs usually have a choice between forums since jurisdiction and venue requirements are often easily met.⁷⁵ From these choices, the plaintiff will naturally prefer the forum with the most favorable law for the claimed cause of action.⁷⁶ For one forum to be the most favorable, it is imperative that every other possible alternative forum is unfavorable in terms of the applicable laws. If such a factor is given considerable weight, dismissal will almost always be improper and "the *forum non conveniens* doctrine [will] become virtually useless."⁷⁷

Placing weight on the fact that other forums have less favorable laws regarding the plaintiff's case is the equivalent of judicially condoning forum shopping. It is predictable that plaintiffs will

67. 285 U.S. 413 (1932).

68. See *Piper*, 454 U.S. at 247.

69. *Id.* at 248.

70. See *id.* at 248-49.

71. *Id.* at 249.

72. See *id.*

73. See *id.*

74. See *id.*

75. *Id.* at 250.

76. *Id.*

77. See *id.*

choose the forum where they have the best chance of prevailing.⁷⁸ Furthermore, the initial inquiry about whether an alternate adequate forum is available is a threshold question.⁷⁹ As such, if less advantageous laws were to disqualify an alternate forum, and plaintiffs always chose the one with the most favorable laws for recovery, the forum non conveniens analysis would always be cut short. Since dismissal is improper where no adequate alternate forum is available, the inquiry would go no further and the doctrine of forum non conveniens would be stripped of its power in almost every situation.⁸⁰ With these considerations in mind, a number of circuit courts⁸¹ held that forum non conveniens dismissals would still be proper despite a plaintiff's reduced chance of recovery under the less favorable laws of the alternate forum.⁸²

(ii) practical considerations

If potential changes in law are given "substantial weight," the task of deciding forum non conveniens dismissals will multiply in complexity.⁸³ Courts will be compelled to engage in a "what if" analysis. They will have to consider different scenarios depending on which jurisdiction's laws apply and in which forum a particular case is heard. Naturally, choice-of-law⁸⁴ analysis will play a pivotal role, thus leaving greater room for litigants to claim error.⁸⁵ Once a

78. *Id.*

79. *Id.* at 254 n.22.

80. *Id.*

81. This list does not include the court of appeal decision reviewed by the United States Supreme Court in *Piper*. *Id.* at 255 n.23.

82. *Id.* (citing a number of cases illustrating this point).

83. *See id.* at 254–55.

84. Choice-of-law is a different doctrine from change in law or change of law. Whereas choice-of-law refers to the issue of which forum's laws will be applied in a court and is not dependent on forum non conveniens, change in law is a term introduced by forum non conveniens cases to refer to the difference in the laws that forums would apply if the litigation were held in the chosen or alternate forum. BLACK'S LAW DICTIONARY 241 (6th ed. 1990).

85. The great range of opinions that courts could potentially adopt regarding choice-of-law in the context of a single set of facts is illustrated by the difference in opinion between the district court and the circuit court in *Piper*. The district court determined that California's application of "governmental interests" analysis and Pennsylvania's "significant contacts" analysis would result in plaintiffs Piper and Hartzell being subject to Pennsylvania and Scottish law respectively. *Piper*, 454 U.S. at 243–44

court identifies the applicable law in both forums, it will "have to compare the rights, remedies, and procedures available under the law[s]" of each forum.⁸⁶ After this lengthy analysis of foreign law, the court would be able to justify dismissal only if it finds that the applicable laws in the alternative forum benefit the plaintiff no less than the laws applicable in the chosen forum.⁸⁷

The forum non conveniens doctrine, however, enables courts to refrain from "conducting complex exercises in comparative law."⁸⁸ The court has an interest in avoiding this problem, and as such, the issue is addressed in the balancing of public interests under the second prong of the forum non conveniens analysis.⁸⁹ The *Piper* court agreed with *Gilbert* and favored dismissal where the court would have to engage in "untangl[ing] problems in conflict of laws, and in law foreign to itself."⁹⁰

There are additional practical problems to giving weight to changes in law. The United States is already an appealing forum, and to give such a factor weight in the forum non conveniens analysis will make it even more attractive.⁹¹ A court will be precluded from dismissing a foreign plaintiff's case against an American manufacturer on grounds of forum non conveniens if courts give the unfavorable change in law substantial weight;⁹² with no argument for undue inconvenience on the U.S. defendant, the change in law consideration will control. Furthermore, under such circumstances, a foreign plaintiff will be free to take advantage of American courts even if the U.S. defendant is abroad when the injury occurs.⁹³ The Court in *Piper* reasoned that, if the law were as the

(discussing the district court opinion *Reno v. Piper Aircraft Co.*, 479 F. Supp. 727, 738 (M.D. Pa. 1979)). Compare the lower court's conclusion on choice-of-law with the circuit court's determination that though the district court was correct that *Piper* was subject to California choice-of-law and that *Hartzell* was subject to Pennsylvania choice-of-law, both states utilized the "false conflicts" test, which resulted in American law applying to both defendants. *Id.* at 245 n.10.

86. *Id.* at 251.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

91. *Id.* at 251-52.

92. *Id.*

93. *Id.* at 251 n.17.

circuit court had stated it, dismissal would be barred in such a scenario “even though none of the parties [were] American, and even though there [was] absolutely no nexus between the subject matter of the litigation and the United States.”⁹⁴

ii. the measure of convenience: balancing private and public interests

Once a court has found that an adequate alternative forum is available, it will balance convenience factors under the second prong of the forum non conveniens analysis. The degree of deference allocated to the plaintiff's choice of forum will either increase or decrease the defendant's burden; the greater the deference, the stronger showing a defendant must make that the balancing of interests weighs in favor of dismissal.⁹⁵ Given that an adequate alternate forum exists, if the defendant overcomes the deference in favor of the plaintiff's choice of forum by showing that the balancing of private and public convenience interests significantly favor dismissal, the court will grant the forum non conveniens dismissal motion.⁹⁶

The second prong of the *Piper* analysis requires the defendant to show that the private interests of the parties and the public interests of the forum indicate that convenience is best served by dismissal.⁹⁷ Private interests consist of the interests of the parties and whether the litigation will result in “oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience.”⁹⁸ The public interests consider the interests of the forums and the “administrative and legal problems” the chosen court may encounter in hearing the case.⁹⁹ Once the court balances the convenience factors and finds that litigating in the chosen forum will place an unnecessarily great burden on the defendant or the court, the

94. *Id.*

95. See *infra* Part VII.B.1.a and VII.B.2.a for the traditional and developing application of deference, respectively.

96. See *infra* Part VII.B.1.b and VII.C.3 for the traditional and developing analyses courts use to consider alternate forums, respectively.

97. See *supra* notes 13–22 and accompanying text.

98. *Piper*, 454 U.S. at 241 (omission in original) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

99. *Id.*

defendant can overcome the presumption in favor of the plaintiff's choice of forum, leaving the door open to dismissal.¹⁰⁰

Under the private interests analysis, courts consider how convenient litigation will be for the parties in the chosen forum versus the alternate forum.¹⁰¹ These interests include: the accessibility of evidence and other "sources of proof;" the availability of mechanisms for the compulsory attendance of unwilling witnesses, and the cost and ease with which willing witness can attend; the ability to view the premises in cases where it is relevant; and "all other practical problems that make trial of a case easy, expeditious and inexpensive."¹⁰² The private interests compare the hardships a defendant would face if the suit were retained in the chosen forum against those the plaintiff would face if the suit were dismissed and the plaintiff had to bring the suit abroad.¹⁰³

The public considerations reflect the degree to which the choice of forum will impact the court's interests.¹⁰⁴ These factors include: the "administrative difficulties" that would result from over-congested courts; the "local interest" in maintaining decision making power over controversies that have to do with the home forum; the interest in avoiding issues of applicable laws in diversity cases and

100. *See id.* at 255 n.23.

101. *Id.* at 241.

102. *Id.* at 241 n.6 (quoting the factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

103. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001). The court in *Iragorri*, however, added perspective to the "[a]ssessment of [c]onveniences." *Id.* at 73. The Second Circuit held that when considering the convenience to parties and the availability of witnesses and evidence, the court should focus on those issues that will actually be litigated as opposed to viewing the convenience markers in terms of the area of law to be litigated. *Id.* at 74. For example, a court may reach different conclusions in balancing conveniences where the issues to be litigated concern the manufacturing of a defective product as opposed to the conduct of actors at the scene of the injury. *Id.* As the setting in which the product is designed may be far removed from where it is used, the issues requiring the examination of witnesses and evidence in the chosen forum may result in completely different determinations under the convenience balancing prong of forum non conveniens. *Id.* This decision indicates that courts should view the convenience factors practically in terms of how they apply, if at all, to the case rather than theoretically as a body of considerations existing independent of the case at hand.

104. *See Piper*, 454 U.S. at 241 n.6.

resolving such cases in forums that are accustomed to the governing law in the action; avoiding unnecessary issues regarding conflict of laws, especially the logistical troubles associated with applying foreign law; and the unfairness of imposing jury duty on the population of a forum that has no interest in or is unrelated to the action.¹⁰⁵ In essence, under the public interests analysis, courts consider which forum is most fit to apply the appropriate laws, which is best suited to resolve the case, and which is most invested in the case.¹⁰⁶

2. Issues addressed by *Piper* and revisited by later courts

The Court in *Piper* addressed a number of issues that courts have developed over the years, but *Piper* continues to be the stepping stone for court decisions today.¹⁰⁷ Courts have addressed forum shopping in various ways over the years. *Piper* started the ball rolling by allocating different degrees of deference to foreign and domestic plaintiffs.¹⁰⁸ However, over the years, courts have become more precise in defining forum shopping and more aggressive in protecting U.S. courts.

a. deference owed to a plaintiff's choice of forum

i. the expanding definition of plaintiffs and deference

In the wake of *Piper*, courts limited their review of forum non conveniens decisions to cases where lower courts failed to follow the "governing legal standard."¹⁰⁹ In terms of the standard for allocating deference to a plaintiff's choice of forum, the courts focused on the underlying principles of *convenience* as opposed to strict adherence to the narrow definitions of resident plaintiffs or home forums.¹¹⁰ For instance, the Second Circuit vacated district court decisions

105. *Id.* (listing the factors set forth by the court in *Gilber*.)

106. Often, a jurisdiction's interest, or lack thereof, in addressing the question, will factor in as a policy interest in human rights cases. For further discussion, see *infra* Part VII.C.5.

107. See, e.g., *Irragori v. Int'l Elevator, Inc.*, 203 F.3d 8 (1st Cir. 2000).

108. *Piper*, 454 U.S. at 255, 255 n.23.

109. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72–73 (2d Cir. 2001).

110. See *id.* at 72; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

where the courts apparently assumed that a U.S. plaintiff's choice of forum deserves deference only where the plaintiff sues in the home district.¹¹¹ In *Wiwa v. Royal Dutch Petroleum Co.*,¹¹² U.S. resident plaintiffs brought suit outside the district in which they resided.¹¹³ The reviewing court held that a district court would be applying the "incorrect standard of law" if it were to weigh this fact against the plaintiffs.¹¹⁴ The district court committed error when it gave U.S. resident plaintiffs' choice of forum less deference because they did not reside in the district where they brought suit.¹¹⁵ In weighing this factor against the plaintiffs, the district court failed to consider the plaintiffs' U.S. residence in their favor.¹¹⁶ A court is in violation of the rationale behind *Piper* where it views a plaintiff's choice of forum with less deference under such circumstances.¹¹⁷ The Supreme Court in *Piper* stated that it is a fair assumption that a plaintiff choosing the home forum is doing so for the sake of convenience.¹¹⁸ As such, that plaintiff's choice is given greater deference.¹¹⁹

The *Piper* court did not address the deference owed to a U.S. resident plaintiff who chooses to litigate in a district other than the one she resides in.¹²⁰ Nonetheless, courts have reasoned that the rationale behind the Supreme Court's assumption in *Piper*—that the plaintiff was motivated by convenience when choosing the forum—also applies to such a case.¹²¹ A plaintiff will necessarily consider where the defendant is amenable to suit when choosing a forum.¹²² Thus, where a U.S. resident plaintiff decides to bring suit outside the

111. *Wiwa*, 226 F.3d at 99–100.

112. 226 F.3d 88 (2d Cir. 2000).

113. *Id.* at 91–94.

114. *Id.* at 103.

115. *Id.* at 106.

116. *Id.*

117. See *Iragorri v United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001).

118. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981). In contrast to the U.S. plaintiff, where a foreign plaintiff chooses to litigate in the United States, such a presumption is much less reasonable; there is a greater likelihood that such a choice was motivated by forum-shopping. *Iragorri*, 274 F.3d at 71.

119. See *supra* notes 32–34 and accompanying text.

120. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Iragorri*, 274 F.3d at 71.

121. See *Iragorri*, 274 F.3d at 71–72; *Wiwa*, 226 F.3d at 103.

122. *Iragorri*, 274 F.3d at 72.

district in which she resides in order to secure jurisdiction over the defendant, her decision should not undermine the presumption of deference typically owed to U.S. plaintiffs.¹²³ Also, it is likely that a U.S. resident plaintiff will find litigating in any U.S. court more convenient than litigating in a foreign jurisdiction.¹²⁴ In accordance with that line of reasoning, courts have held that an American citizen's "home forum" includes *any* court of the United States.¹²⁵

The Second Circuit, however, reasoned that this increased deference for a plaintiff's choice is not the equivalent of giving "talismanic significance to the citizenship or residence of the parties."¹²⁶ Rather, citizenship and residence are "'no longer . . . absolutely determinative factors'" in a forum non conveniens motion.¹²⁷ Nonetheless, a plaintiff's U.S. residence or citizenship plays an important role in the private and public convenience analysis set forth in *Gilbert*;¹²⁸ it tips the scales in the plaintiff's favor.¹²⁹

ii. the "sliding scale" of deference

The Second Circuit, in *Iragorri v. United Technologies Corp.*,¹³⁰ stated that the degree of deference due a plaintiff's choice of forum moves along a "sliding scale," depending on the circumstances of each case.¹³¹ A plaintiff's choice of forum receives greater deference when it is motivated by "reasons that the law recognizes as valid."¹³²

123. *Id.* at 73.

124. *Id.*

125. "[T]he 'home forum' for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 146 n.4 (2d Cir. 2000) (quoting *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991)).

126. *Wiwa*, 226 F.3d at 102 (quoting *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980)). The *Wiwa* court held that its earlier en banc decision in *Alcoa*, which rejected such "talismanic significance," was not inconsistent with the increased deference standard. *Id.*

127. *Id.* at 102 (quoting *Alcoa*, 654 F.2d at 157).

128. *Id.*

129. *Id.* (discussing the *Guidi* holding that where public interest factors do not compel dismissal, the U.S. plaintiff's residence or citizenship warrants retaining jurisdiction over the case).

130. 274 F.3d 65 (2d Cir. 2001).

131. *Id.* at 71.

132. *Id.* at 71-72.

More specifically, the deference owed to a plaintiff's choice of forum grows incrementally when the convenience considerations favor litigation in the United States and the plaintiff has a "bona fide connection" with the United States and the chosen forum.¹³³ Factors that indicate convenience and a "bona fide connection" include: how conveniently situated the plaintiff's residence is to the district, the amenability of defendant to suit in the chosen forum, and the availability of witnesses, evidence, and legal assistance.¹³⁴ The more that these and other concerns relating to convenience and expense point to a legitimate motivation for the plaintiff's choice of forum, the greater the deference courts will give to the plaintiff's selection.¹³⁵ Consequently, the more reasons a plaintiff gives the court to assume that the plaintiff's choice was based on convenience, the steeper the defendant's uphill battle will be to overcome the court's deference for the plaintiff's choice.¹³⁶ If, however, the plaintiff's choice of forum cannot be supported by the factors listed above, the choice of forum will warrant less deference and it will be easier for a defendant to prevail on a motion for dismissal under *forum non conveniens*.¹³⁷

iii. treaty obligations and the meaning of "national treatment"

The Supreme Court in *Piper* did not address the issue of foreign national plaintiffs in U.S. courts.¹³⁸ Although the Second Circuit also did not issue a ruling on the matter in *Iragorri*, the court's "analysis [was] mindful of those considerations."¹³⁹ The court invited the U.S. Attorney General to file an *amicus curiae* regarding the degree of deference owed to U.S. resident plaintiffs suing outside the district in which they reside—the "central issue" in the case.¹⁴⁰

133. *Id.* at 72.

134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.* at 71; *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

139. *Iragorri*, 274 F.3d at 69 n.2. Despite the fact that no explicit ruling was made regarding this matter, the Second Circuit's initiative in exploring the issue, which was not before it in any capacity, is consistent with expanding and more clearly defining the status of plaintiffs from the original description in *Piper*.

140. *Id.*

The court was especially interested in the State Department's and the Solicitor General's opinions regarding "how, if at all, the question presented is affected by [U.S.] treaty obligations . . . including any treaty obligations concerning reciprocal access to courts by nationals of other countries."¹⁴¹ Reciprocal access to courts would, in effect, expand the number of plaintiffs the U.S. courts grant a forum to. A decision regarding U.S. treaty obligations would also raise questions as to whether granting reciprocal access obligates courts to regard nationals with the same deference it does U.S. plaintiffs.¹⁴²

When the Department of Justice responded in lieu of all other parties addressed by the court, it stated that the United States' participation in numerous treaties raises an obligation to make its courts accessible to plaintiffs from participating countries by granting them "national treatment."¹⁴³ Simply stated, this term mandates that nationals from a country that is a party to the treaty would be "entitled . . . access to U.S. courts" on equal footing with U.S. nationals under similar circumstances.¹⁴⁴ The Department of Justice made three points regarding the issue. First, it reiterated the Supreme Court's rationale in *Piper*, that though the issue of citizenship is relevant to the degree of deference, it is not dispositive.¹⁴⁵ Second, any right to access U.S. courts that treaties grant to a foreign national plaintiff "will generally be only a right to the same access that would be accorded to a U.S. national plaintiff who is otherwise similarly situated."¹⁴⁶ Third, there is no reason to assume that applying the provisions of such treaties would be "unworkable or inappropriate."¹⁴⁷

In *Pollux Holding Ltd. v. Chase Manhattan Bank*,¹⁴⁸ the Second Circuit reaffirmed its earlier assertion that a court must consider relevant treaty obligations when reviewing a forum non conveniens motion.¹⁴⁹ First, the court must determine whether the treaty entitles

141. *Id.* (quoting the lower court's opinion).

142. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72 (2d Cir. 2003).

143. *Iragorri*, 274 F.3d at 69 n.2.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 329 F.3d 64 (2d Cir. 2003).

149. *Id.* at 76-77.

the foreign plaintiffs to access American courts.¹⁵⁰ That question is separate from the level of deference the courts give a foreign plaintiff's choice to litigate in the United States.¹⁵¹ The nature of the treaty will determine whether the courts afford the foreign plaintiff the same deference it gives U.S. plaintiffs who choose to litigate in their home forums.¹⁵²

Courts must adhere to the "explicit" provisions of a treaty.¹⁵³ A court will view a foreign plaintiff's choice of the U.S. forum with little deference¹⁵⁴ where the treaty simply provides for "reciprocal free access" to the courts¹⁵⁵ and does not explicitly provide for "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country."¹⁵⁶ A treaty that calls for "freedom of access" cannot be construed to provide "national access" and will only "merit[] the lesser degree of deference typically afforded foreign plaintiffs."¹⁵⁷ In the past, courts limited the number of foreign plaintiffs they treated with the same deference due U.S. plaintiffs to cases where the applicable treaties explicitly provided for national access.¹⁵⁸

150. *See id.* at 72.

151. *See id.* at 72-73.

152. *See id.*

153. *Id.* "History and practice . . . teach that a principle of equal access must be explicitly adopted." *Id.* at 72 (omission in original) (quoting *Murray v. British Broad. Corp.*, 81 F.3d 287, 291 (2d Cir. 1996)).

154. *Id.*; *see also* *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978) (holding that the typically lesser degree of deference due foreign plaintiffs did not apply in this case, where a treaty between the U.S. and the foreign plaintiff's country provided nationals of the two countries access to both countries' courts on "terms no less favorable than those applicable to nationals of the court's country").

155. *Pollux Holding*, 329 F.3d at 72. "The nationals of each [country] shall enjoy freedom of access to the courts of justice of the other . . . in all degrees of jurisdiction established by law." *Id.* (alterations and omissions in original) (quoting Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.-Liber., art. I, 54 Stat. 1739, 1740).

156. This is the equivalent of national access. *See Farmanfarmaian*, 588 F.2d at 882.

157. *Pollux*, 329 F.3d at 73.

158. *Id.* at 72, *see also* *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (discussing a treaty that "accords its nationals access to our courts equivalent to that provided American citizens"); *Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984) (stating that "[u]nder the terms of a separate treaty between the United States and Ireland,

b. 1404(a) transfer and forum non conveniens

According to the Court in *Piper*, the Circuit Court erred in analogizing a forum non conveniens analysis to a statutory transfer pursuant to section 1404(a).¹⁵⁹ Forum non conveniens and section 1404(a) differ in their purposes, operation, and consequences. Though they have common roots in legislation, they are entirely independent phenomena.¹⁶⁰

Congress drafted section 1404(a), which allows a change in venue between federal courts, in accordance with the doctrine of forum non conveniens.¹⁶¹ Nonetheless, it was intended to revise the common law rather than codify it.¹⁶² Under section 1404(a), district courts have greater discretion to transfer a case than they have to dismiss it on grounds of forum non conveniens.¹⁶³ The difference in the discretion that courts have is a natural result of the consequences that follow the granting of each motion; while transferring a case simply changes the venue within a unified system, dismissal is a severe measure. After dismissal, there are no guarantees that a case will be heard in an alternate forum, much less that the laws of that forum will be as favorable to the case.¹⁶⁴

The Second Circuit, in its en banc rehearing of *Irragorri*, viewed a section 1404(a) transfer as a less severe alternative in certain situations.¹⁶⁵ The availability of a discernibly more convenient U.S. district justifies a transfer of venue under the statute where a defendant has not met her burden to demonstrate grounds for dismissal and there is a good basis for litigation in the United States.¹⁶⁶ It seems almost as if a court could use it as the lesser of two evils. Such a resolution would be “in the interest of justice,” as opposed to a full-blown dismissal of the suit under forum non conveniens.¹⁶⁷

appellant was entitled to national treatment with respect to . . . having access to the courts of justice.” (internal quotation marks omitted)).

159. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).

160. See *id.* at 253–54.

161. *Id.* at 253.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Irragorri v. United Techs. Corp.*, 274 F.3d 65, 72 n.4 (2d Cir. 2001).

166. *Id.*

167. *Id.*

c. flexibility of considerations

The Court in *Piper* reflected on the emphasis past court decisions consistently placed on the need to retain flexibility in deciding *forum non conveniens* dismissals.¹⁶⁸ The Court refused to confine itself to a single controlling consideration, finding each factor to be merely one of many factors that show convenience.¹⁶⁹ In *Williams v. Green Bay & Western R.R. Co.*,¹⁷⁰ the Court further indicated its resolve to refrain from laying down rigid rules for the *forum non conveniens* analysis, leaving courts free to exercise their discretion and consider each case as it "turns on its facts."¹⁷¹

d. review of forum non conveniens determinations

In reversing the Circuit Court's decision in *Piper*, the United States Supreme Court established that the "*forum non conveniens* determination is committed to the sound discretion of the trial court."¹⁷² The standard of review is abuse of discretion.¹⁷³ Accordingly, the reviewing court may reverse such a decision only where the trial court committed a "clear abuse of discretion."¹⁷⁴ If, however, the trial court has: (1) taken into consideration all the relevant public and private interests, and (2) balanced these factors with reasonable diligence, the court's decision warrants "substantial deference."¹⁷⁵ If the trial court meets these requirements in making its decision, the reviewing court cannot substitute its own judgment for that of the lower court.¹⁷⁶

Although the Second Circuit Court of Appeals reaffirmed the broad discretion that the court in *Piper* granted to trial courts under *forum non conveniens*, it held that the determination was

168. *Piper*, 454 U.S. at 249.

169. *Id.* at 249-50.

170. 326 U.S. 549 (1946).

171. *Id.* at 557 (to put the doctrine in "proper perspective," the court listed "special circumstances" that lead courts to decline jurisdiction; these "illustrations" attest to the fact that "[e]ach case turns on its facts").

172. *Piper*, 454 U.S. at 257.

173. *Williams*, 326 U.S. at 557-58 (reaffirming the circuit court's correct identification of the abuse of discretion standard in *Piper* despite their failure to apply it appropriately).

174. *See id.* at 557.

175. *See id.*

176. *See id.*

"nevertheless . . . subject to 'meaningful appellate review.'"¹⁷⁷ The court in *Boosey & Hawkes Music Publishers v. Walt Disney Co.*¹⁷⁸ vacated the trial court's decision to dismiss on forum non conveniens grounds and held that a trial court's decision to dismiss on such grounds will be reversed on appeal where it has failed to show that an adequate alternate forum exists and that the balancing of convenience factors strongly favors litigation in that alternate forum.¹⁷⁹ The *Boosey* district court failed to meet the requirement of a "pre-dismissal determination that the claims be justiciable somewhere," that is, that there be an adequate alternate forum where the case could be heard.¹⁸⁰ In addition, the lower court gave excessive weight to the presence of foreign law when it balanced convenience factors.¹⁸¹ Although a court's reluctance to apply foreign law weighs in favor of dismissal, this is just one of many other factors in the convenience balancing test and must be considered along with other relevant interests; it cannot justify dismissal in and of itself.¹⁸²

C. Issues developed in the federal forum by post-Piper cases

1. Forum selection clauses

In cases that include forum selection clauses, the forum non conveniens analysis is governed by different legal standards depending on the nature of that clause.¹⁸³ Mandatory and permissive forum selection clauses imply certain things about the parties and the choices they have already made, and as such, the forum non conveniens analysis changes accordingly.

177. *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998) (quoting *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, 942 F.2d 164, 167 (2d Cir. 1991)).

178. 145 F.3d 481 (2d Cir. 1998).

179. *Id.* at 491.

180. *Id.* at 491 n.8.

181. *Id.* at 492.

182. *Id.*

183. See *AAR Int'l, Inc. v. Nimelias Enters S.A.*, 250 F.3d 510, 524 (7th Cir. 2001).

a. mandatory clause

*Bonny v. Society of Lloyd's*¹⁸⁴ and *The Bremen v. Zapata Off-Shore Co.*¹⁸⁵ control the forum non conveniens inquiry where the case involves a mandatory forum selection clause. Although the clause indicates that the parties have agreed to litigate in the forum specified in the contract, a party can oppose jurisdiction and bring a forum non conveniens motion to have the case dismissed in favor of an alternate forum.¹⁸⁶ Different circuits, however, apply the standards set forth in *Bonny* and *Bremen* differently.

In *AAR International, Inc. v. Nimelias Enterprises S.A.*,¹⁸⁷ the Seventh Circuit held that the "usual" two prong forum non conveniens analysis in *Piper* does not apply where the parties contracted for a mandatory forum.¹⁸⁸ A party who agrees to a "mandatory forum selection agreement" waives all objections to the chosen forum based on convenience or cost.¹⁸⁹ Rather, the initial determination the court must make is whether the forum selection clause is enforceable under the criteria set forth by the United States Supreme Court in *Bremen*.¹⁹⁰ The forum selection clause does not "oust" the reviewing court's jurisdiction to determine if the clause is enforceable, but "absent a strong showing" that enforcing the clause would be "unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," the contractual forum will control.¹⁹¹

The Seventh and Second Circuits interpreted the presence of a mandatory forum selection clause to mean different things in the context of the forum non conveniens analysis. Whereas the Seventh Circuit in *AAR* interpreted *Bremen* to mean that an enforceable clause nullifies the forum non conveniens analysis, the Second Circuit in *Evolutions Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*¹⁹² was "persuaded" that the clause "eliminates" the

184. 3 F.3d 156 (7th Cir. 1993).

185. 407 U.S. 1 (1972).

186. See *AAR Int'l*, 250 F.3d at 525-26.

187. *Id.* at 510.

188. *Id.* at 524.

189. *Id.* at 526 (citing *Northwestern Nat'l. Ins. Co. v. Donovan*, 916 F.2d 372, 375, 378 (7th Cir. 1990)).

190. *Id.* at 524-25.

191. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15 (1972).

192. 145 F.3d 505 (2d Cir. 1998).

defendant's burden to show that the convenience factors weigh strongly in favor of litigation in the alternate forum.¹⁹³ The removal of such a burden translates into a "level playing field,"¹⁹⁴ and the court no longer presumes that the plaintiff chose the forum for the sake of convenience.¹⁹⁵

The First Circuit in *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*¹⁹⁶ took a contrary view and limited the effect of a mandatory forum selection clause on the forum non conveniens analysis.¹⁹⁷ Rather than finding that an enforceable clause preempts the application of the forum non conveniens doctrine, the court incorporated the clause into the traditional balancing scheme under *Piper*. A forum selection clause is "simply one of the factors" that a court should consider in conducting the *Piper* balancing test.¹⁹⁸

i. stricter scrutiny forum non conveniens

(a) Bremen standard

In *Bremen*, the parties chose London as their forum. This choice was reasonable, both in terms of the certainty it brought to the international transaction and the forum's ability to handle the litigation with neutrality and expertise.¹⁹⁹ Zapata contested the London forum as inconvenient, but, as Zapata had agreed to the clause, any inconvenience that would result from litigating in the "contractual forum . . . was clearly foreseeable at the time of contracting."²⁰⁰ To "escape" litigation in the contractual forum,

193. *Id.* at 510–11.

194. Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and The All Writs Act*, in 1 ALI-ABA COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 221, 382 (2003), WL SH0631 DCI-ABA 221, at *382.

195. *Evolution Online Sys.*, 145 F.3d at 511.

196. 906 F.2d 45 (1st Cir. 1990).

197. *AAR Int'l, Inc. v. Nimelias Enters.*, 250 F.3d 510, 524–25 (7th Cir. 2001).

198. *Id.* at 525 (quoting *Royal Bed & Spring*, 906 F.2d at 51).

199. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).

200. *Id.* at 17–18.

parties who freely contracted for the forum must show that litigation in that forum "will be so gravely difficult and inconvenient that [the parties] will for all practical purposes be deprived of [their] day in court."²⁰¹ Otherwise, holding parties to their bargain would not be "unfair, unjust, or unreasonable."²⁰²

(b) *Exception: Bonny factors*

A court will presume that the forum selection clause is valid and enforceable unless the party opposing the enforcement of the clause shows that one of the three exceptions in *Bonny* applies.²⁰³ Otherwise, dismissal under forum non conveniens will not be granted, and the suit will take place in the forum specified by the clause.²⁰⁴ The first exception exists where the clause is included in the contract as a "result of fraud, undue influence, or overweening bargaining power."²⁰⁵ The second exception applies to situations in which "the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court."²⁰⁶ The third exception is concerned with whether enforcing the clause at issue would undermine a "strong [statutory or judicially declared] public policy of the forum in which the suit is brought."²⁰⁷

b. *permissive clause*

i. traditional forum non conveniens analysis

In its *AAR International* decision, the Seventh Circuit followed the Second Circuit's example in *Blanco v. Banco Industrial de Venezuela, S.A.*²⁰⁸ and found the distinction between permissive and mandatory forum clauses to be "reasonable."²⁰⁹ The Second Circuit in *Blanco* held that the "traditional doctrine" of forum non

201. *Id.* at 18.

202. *Id.*

203. *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159–61 (7th Cir. 1993).

204. *AAR Int'l, Inc. v. Nimelias Enters.*, 250 F.3d 510, 526 (7th Cir. 2001).

205. *Id.* at 525 (quoting *Bonny*, 3 F.3d at 160).

206. *Id.* (alteration in original) (quoting *Bonny*, 3 F.3d at 160).

207. *Id.* (quoting *Bonny*, 3 F.3d at 160).

208. 997 F.2d 974 (2d Cir. 1993).

209. *AAR Int'l*, 250 F.3d at 525.

conveniens applies to permissive forum selection clauses²¹⁰ rather than the “heightened scrutiny” in *Bremen*.²¹¹ The court in *Blanco* determined the nature of the forum selection clause by focusing on the “nonmandatory words [in the] . . . agreement, and not . . . [the fact that] the permissive clause contemplate[d] more than one forum.”²¹² The court proceeded to engage in the *Piper* two prong analysis of forum non conveniens after finding that the clause was permissive as opposed to mandatory.²¹³

2. International forum shopping

a. plaintiff's forum shopping

American courts are appealing to foreign and domestic plaintiffs. The possibilities for bringing suit in U.S. courts multiply with each state that offers strict liability as a cause of action.²¹⁴ Furthermore, with so many American states to choose from, the number of inviting jurisdictions is abundant, and since each applies its own choice-of-law rules, the shopping plaintiff can find just the right fit. Another appealing aspect of American courts is the availability of jury trials, in comparison to civil law jurisdictions where courts refrain from using juries.²¹⁵ In addition, litigation in U.S. courts is more affordable because plaintiffs have the option of using contingent fees, which are not available in foreign jurisdictions.²¹⁶ Also, U.S. courts do not impose a monetary penalty in the form of attorney's fees on the losing party²¹⁷ and are more attractive forums because of the extensive discovery process.²¹⁸ All in all, these qualities of U.S. courts make them a prime choice for plaintiffs seeking damages from around the world.

210. *Blanco*, 997 F.2d at 977, 980.

211. *Id.* at 980.

212. *Id.* at 979.

213. *Id.* at 980.

214. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981). A majority of states accept strict liability as a theory for recovery. *Id.*

215. *Id.*

216. *Id.* (discussing RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 275–77 (3d ed. 1970)).

217. *Id.*

218. *Id.*; see also SCHLESINGER, *supra* note 216, at 307, 310 & n.33).

b. defendant's forum shopping

Since courts refuse to give substantial weight to the plaintiff's argument regarding an unfavorable change in law, it necessarily follows that courts should not consider a potential change in law that favors the defendant either.²¹⁹ *Piper* recognized that defendants themselves may engage in their own brand of forum shopping—"reverse forum-shopping"—when filing a motion to dismiss under forum non conveniens.²²⁰ Regardless of the defendant's motive, if the defendant overcomes the presumption in favor of the plaintiff's choice, dismissal is proper.²²¹ The defendant's attempt at reverse forum shopping "should not enter into a trial court's analysis of the private interests."²²²

Recently, however, the Second Circuit in *Iragorri* expressed its distaste for a defendant's forum shopping efforts.²²³ Defendants may use dismissal under forum non conveniens for reasons other than a "genuine concern" for convenience.²²⁴ Thus, district courts must "arm themselves with an appropriate degree of skepticism" when considering whether defendants have successfully demonstrated a "genuine inconvenience" to themselves and the chosen forum as well as a "clear preferability" for the alternate foreign forum.²²⁵

3. Alternative forum

Dismissal on forum non conveniens grounds cannot be granted unless an adequate alternate forum is available. In every instance that a court finds dismissal proper, "it presupposes at least two forums in which the defendant is amenable to process."²²⁶ These include the chosen forum where the suit is already before the jurisdiction of the court and the alternate forum that must be "available" to the plaintiff. The Eleventh Circuit considered whether an alternate forum is available and whether it is adequate as two separate issues.²²⁷

219. *Piper*, 454 U.S. at 252 n.19.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001).

224. *Id.*

225. *Id.*

226. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947).

227. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001).

a. availability

When defendants bring forum non conveniens motions for dismissal, they carry the burden of showing that an adequate alternate forum exists.²²⁸ The availability requirement is typically met where the defendant is “amenable to process” in the alternative jurisdiction.²²⁹ A defendant has great control over such a finding; quite often, the defendant need only submit to the foreign forum’s jurisdiction in order to meet this burden.²³⁰ When a plaintiff selects a forum because the defendant is subject to personal jurisdiction there, a defendant can easily rob the plaintiff’s choice of its “significance” by consenting to jurisdiction in the alternate forum.²³¹

b. adequacy

The defendant also carries the burden of showing that the alternate forum is adequate.²³² Courts, however, continue to question how inadequate a forum must be in order to disqualify it. Courts consistently require that the alternate jurisdiction “offer[] at least some relief.”²³³ *Piper* held that dismissal is not proper where “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”²³⁴ Such inadequacy, however, occurs under “rare circumstances.”²³⁵ Substantive and procedural “disadvantages” are often not enough to disqualify an alternate forum as inadequate.²³⁶

i. does corruption make a forum truly inadequate?

An alternate forum with a corrupt system may not be perfect, but courts often find corruption to be a far cry from inadequacy. *Piper*

228. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000).

229. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

230. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476–77 (2d Cir. 2002).

231. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 202–03 (2d Cir. 1987).

232. See *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001) (defendant had the burden of proving that Argentina was an adequate forum).

233. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2002).

234. *Piper*, 454 U.S. at 254.

235. *Id.* at 254 n.22.

236. *In re Union Carbide*, 809 F.2d at 198–99, 202–03.

defined an inadequate forum as one that is "clearly unsatisfactory" or provides "no remedy at all."²³⁷ Courts are reluctant to find that an alternate jurisdiction is inadequate due to corruption—that issue has not "'enjoy[ed] a particularly impressive track record'" in U.S. courts.²³⁸

Courts are unwilling to find a forum inadequate solely because of corruption or inefficiency, so a plaintiff must bring forth evidence of significant corruption to defeat dismissal under forum non conveniens.²³⁹ Ultimately, the defendant still has the burden of persuading the court that the alternate forum is adequate, "but only where the plaintiff has substantiated [her] allegations of serious corruption or delay."²⁴⁰ Therefore, where a plaintiff has not substantially supported a claim of inadequacy with evidence,²⁴¹ the defendant need not present any evidence to show otherwise; the court may simply reject the plaintiff's argument.²⁴² In effect, when a

237. *Piper*, 454 U.S. at 254 & n.22.

238. *Leon*, 251 F.3d at 1311–12 (quoting *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997)); see also, e.g., *Aguinda v. Texaco*, 303 F.3d at 470, 478 (2d Cir. 2002) (allegations of a judiciary as being unreceptive to tort claims and influenced by corruption were rebutted by "detailed findings" regarding the outcome of other tort cases and a lack of evidence indicating corruption in prior and pending judicial proceedings); *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73–74 (2d Cir. 1998) (stating the issue of adequacy as a question of, not whether recovery is available under a specific statute such as RICO, but as, whether the laws in the alternate forum were "an adequate, not identical, alternative" and that "comity preclude[s] a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards").

239. *Leon*, 251 F.3d at 1312.

240. *Id.* Courts' general unwillingness to pass judgment on the substantive differences between forums is not as clear where the foreign jurisdiction is a dysfunctional legal system. *Id.* (citing *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141–42 (2d Cir. 2000) (declining to enforce judgment by Liberian court where plaintiff offered "sufficiently powerful and uncontradicted documentary evidence" of the chaos within the Liberian judicial system and the unfairness that would result)).

241. See, e.g., *Leon*, 251 F.3d at 1312 (citing *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 678 (D.C. Cir. 1996) (plaintiff's allegations that alternate forum lacked impartiality were general and insufficient to make the forum inadequate); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1351 (1st Cir. 1992) (plaintiff's argument for an inadequate forum were rejected because she did not offer substantial evidence that Turkish courts would be unable to treat women fairly)).

242. *Id.* at 1312.

plaintiff bases her argument for inadequacy on a forum's corruption, the burden shifts to the plaintiff to show that the forum is inadequate.²⁴³

For instance, in *Aguinda v. Texaco, Inc.*,²⁴⁴ where the plaintiff did not offer substantial evidence of corruption, the court's examination of the foreign jurisdiction appeared superficial even though the court claimed to be relying on "detailed findings."²⁴⁵ The factors that the appellate court considered in determining that the alternate court was adequate consisted of the district judge's findings regarding: the presence of other similar cases on the dockets of the alternate forum; the absence of any apparent corruption or evidence of impropriety; the fact that other U.S. courts had found the jurisdiction to be adequate; and the public and political scrutiny to which the case would be subject.²⁴⁶ The court felt that this short list of "findings" was a sufficient check on the adequacy of the alternate forum.²⁴⁷ It also clearly illustrated the sentiment that an "adequate forum need not be a perfect forum."²⁴⁸

ii. does a procedural disadvantage make a forum inadequate?

Procedural differences in jurisdictions worldwide are significant. However, courts tend to treat these differences as inconveniences that are easily overcome rather than constructive bars to litigation.²⁴⁹ A number of appellate courts have held that a lack of procedural

243. *Id.*

244. 303 F.3d 470 (2d Cir. 2002).

245. *See id.* at 478.

246. *Id.*

247. *See id.* ("We cannot say that these findings were an abuse of discretion."). *But see* McNamara, *supra* note 58, at 561 (discussing a Ninth Circuit case in which the court reversed a forum non conveniens dismissal where the lower court "'failed to explain what evidence it had that Japan was an adequate forum.'" (quoting *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1090 (9th Cir. 1999))). Instead, the court in *Alpha Therapeutic* relied on a previous Ninth Circuit opinion that had not found any cases disqualifying Japan as an inadequate forum. *Id.* at 562 (citing *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764 (9th Cir. 1991)). The decision in *Alpha Therapeutic* confirmed that a forum non conveniens dismissal based on an inadequate forum would have to be based on a "solid evidentiary record." *Id.*

248. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001).

249. *See Aguinda*, 303 F.3d at 478.

devices, namely those available in the federal courts, cannot, in itself, render an alternative forum inadequate.²⁵⁰ Even the absence of procedures deeply rooted in the United States judicial process, such as trial by jury, do not render the alternate forum inadequate.²⁵¹ It seems only natural that the absence of other procedural benefits associated with U.S. district courts would not disqualify an alternate forum either.²⁵² Courts take the position that the United States has no business supervising the courts of the world to ensure the integrity of the judicial process.²⁵³ The beneficial procedures are, as the word suggests, *benefits* of the U.S. courts and not rights inherent in worldwide litigation.

In the interest of justice, however, U.S. courts have gone one step further where the availability of the foreign forum is questionable due to unsettled foreign law; by granting conditional dismissals on forum non conveniens grounds, some U.S. courts have left open the possibility of reconsidering the case.²⁵⁴ Nonetheless, where the plaintiff introduces evidence of "extreme amounts of . . .

250. See, e.g., *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990).

251. See *Lockman Found.*, 930 F.2d at 768.

252. E.g., *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (inadequacy of alternative forum not established by prospect of lesser recovery); see also *Aguinda*, 303 F.3d at 478 (Ecuadorian courts' refusal to recognize class actions found to be burdensome but not a deprivation of an adequate forum where defendant waived defense on statute of limitations to enable plaintiff adequate time to obtain the required signatures from individual plaintiffs).

253. See e.g., *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991).

254. Conditions imposed include requiring the defendant to submit to personal jurisdiction in the alternate forum and waive the statute of limitations as a defense; such conditions are not unusual and numerous courts have held that without such conditions, the foreign forum would not qualify as an adequate alternative forum. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203-04 (2d Cir. 1987). But see *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477 (2d Cir. 2002) (citing *Bank of Credit and Commerce Int'l v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir. 2001) (suggesting that the degree of protection provided by a conditional dismissal under forum non conveniens depends on how certain the unavailability of the alternate forum is)). For an "unusual" use of the safeguarding mechanism, see *McNamara*, *supra* note 58, at 561. The Fifth Circuit has made this "routine" practice into an additional requirement; it is mandatory that the court ensures a plaintiff's right to reinstate the case by granting a conditional dismissal. *Id.*

inefficiency,” the severity of the impediment, often gauged in years of delay, undermines the adequacy of the alternative forum.²⁵⁵ A forum that subjects the parties to a long delay is merely inefficient, while one that subjects parties to an excessive delay is inadequate; “[a]t some point . . . the prospect of judicial remedy becomes so temporally remote that it is no remedy at all.”²⁵⁶

4. Federal and state forum non conveniens

*a. forum non conveniens: procedural federal law for purposes of Erie*²⁵⁷

The Fifth Circuit faced an “*Erie*-doctrine choice” in *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*.²⁵⁸ The court held that federal courts are required to apply the federal law of forum non conveniens in diversity cases.²⁵⁹ The “self-regulation, . . . administrative independence, and . . . self-management” of the federal forum take precedence over any “disruption of uniformity” that applying federal forum non conveniens would cause.²⁶⁰ The Tenth Circuit, like a majority of the circuits,²⁶¹ affirms the ruling that “federal, not state, law [of forum non conveniens] governs.”²⁶²

255. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (citing *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227–31 (3d Cir. 1995) (delays of 25 years made the alternate Indian forum inadequate)).

256. *Bhatnagar*, 52 F.3d at 1227–28 (distinguishing the litigation delay in Indian courts from the “unfortunate” but “minor” delays of other courts that were “of no legal significance”) (citing *Brazilian Inv’t Advisory Servs., Ltda. v. United Merchs. & Mfg., Inc.*, 667 F. Supp. 136, 138 (S.D.N.Y. 1987) (delay of up to two and a half years); *Broad. Rights Int’l Corp. v. Societe du Tour de France, S.A.R.L.*, 708 F. Supp. 83, 85 (S.D.N.Y. 1989) (delay of at least two years “and possibly longer”)).

257. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

258. *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987).

259. *Id.* at 1159.

260. *Id.*

261. *Rivendell Forest Prods, Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993) (citing support from a majority of the circuits, which held that the federal courts sitting in diversity cases are bound by the federal doctrine of forum non conveniens).

262. *Rivendell*, 2 F.3d 990 at 992.

b. the applicability of forum non conveniens to federal question claims

i. antitrust cases

The Second Circuit in *Capital Currency Exchange N.V. v. National Westminster Bank PLC*,²⁶³ applied forum non conveniens to antitrust cases. The real parties in interest were foreign, and as such, the court did not defer to the plaintiff's choice of forum. Moreover, the alternate forum, England, was not inadequate simply because that court would not apply the Sherman Act.²⁶⁴ A change in the substantive law between forums does not render forum non conveniens dismissal improper.²⁶⁵ Since the English court was obligated to apply articles 85 and 86 of the Treaty of Rome, the plaintiff would still be able to address the defendant's anti-competitive behavior.²⁶⁶

The First Circuit went one step further and applied the forum non conveniens doctrine to an antitrust case despite the existence of a special venue statute.²⁶⁷ The court found that the language of "a special venue statute" does not consider the effect that statute would have on transfers made for the sake of convenience.²⁶⁸ It "does not forbid transfer."²⁶⁹ Rather, it remains silent on the matter and "simply adds to the number of courts empowered to hear a plaintiff's claim."²⁷⁰ There is "no good policy reason" to read an intent into the special venue provisions on Congress' part "to remove the courts' legal power to invoke the doctrine of forum non conveniens in an otherwise appropriate case."²⁷¹ Rather, the globalized and interdependent nature of national economies and commerce make it more likely that actions in one country will affect people abroad.²⁷² For the sake of uniformity, convenience and justice, the court

263. 155 F.3d 603 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999).

264. *Id.* at 609-10.

265. *See infra* Part VII.B.1.b.i.(a) for further discussion of change in law and inadequate forums.

266. *Capital Currency*, 155 F.3d at 610.

267. *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 949 (1991).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 950.

272. *Id.*

rejected the SEC's argument that "courts *never* have power to dismiss a private securities law case on *forum non conveniens* grounds."²⁷³

ii. RICO cases

In *Transunion Corp. v. PepsiCo, Inc.*,²⁷⁴ the Second Circuit ruled that dismissing the Philippine corporation's suit against a New York corporation in New York was proper under *forum non conveniens*.²⁷⁵ The Philippines provided an adequate alternate forum because, even though plaintiffs could not claim RICO violations, the alternate forum would hear the claims regarding the underlying fraud.²⁷⁶ Furthermore, the fact that the plaintiff corporation would be unable to get the significantly larger damages associated with a RICO claim in the alternate forum was "irrelevant."²⁷⁷ For an alternate forum to be adequate, it does not have to have an identical cause of action;²⁷⁸ so long as the forum "adequately address[es] the underlying controversy," the mere absence of a RICO statute does not preclude the forum as an alternative.²⁷⁹

c. *an added concern: domestic forum shopping*

State courts utilize *forum non conveniens* to decline jurisdiction so that the suit can be filed in a more convenient forum or sister state. In each state, the doctrine becomes an instrument of that state's law, and although most states follow the standards set forth in

273. *Id.* at 949–50. In 1992, most courts shared the First Circuit's rationale and had issued decisions that were contrary to what the SEC "urge[d] upon" them. *Id.* at 949. *But see* *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573 (1948) (reversing dismissal under the Sherman Act on grounds that another U.S. district court was more convenient). However, the *Howe* court noted the fact that *National City Lines* only addressed "domestic transfers" and not "international transfers." *Howe*, 946 F.2d at 949.

274. 811 F.2d 127 (2d Cir. 1987) (*per curiam*).

275. *Id.* at 129.

276. *Id.*

277. *Id.*

278. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998).

279. *Id.* at 74 (citing *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144–45 (5th Cir. 1989)). RICO's legislative history does not imply that the statute is immune from *forum non conveniens* analysis. *Id.*

Piper, some state courts have strayed.²⁸⁰ An example of such a variation is found in California.²⁸¹ California has codified its version of the *forum non conveniens* doctrine in the Code of Civil Procedure Section 410.30.²⁸²

In *Stangvik v. Shiley Inc.*,²⁸³ the California Supreme Court set forth its own standards to determine whether a trial court should dismiss a case under *forum non conveniens* when a nonresident plaintiff brings suit against a California corporation in its home state. The court created a modified version of the two prong test set forth in *Piper* for application in California courtrooms.

Like the adequate alternate forum prong in *Piper*, the first prong in California is a threshold question regarding the alternate forum. The state version, however, calls for a "suitable" forum as opposed to an "adequate" one. The suitability standard in California stems from the Judicial Council Comment to section 410.30.²⁸⁴ The suitability of a forum depends on whether "an action may be commenced in the alternative jurisdiction and a valid judgment

280. See, e.g., *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 250 (1984) (finding that the threshold requirement of an adequate alternate forum stated in *Piper* is "a most important factor to be considered in applying the *forum non conveniens* doctrine," but in its absence, a trial court may still decline jurisdiction), *cert. denied*, 469 U.S. 1108 (1985).

281. See generally, *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991); *Shiley Inc. v. Superior Court*, 4 Cal. App. 4th 126 (1992).

282. *Am. Cemwood Corp. v. Am. Home Assurance Co.*, 87 Cal. App. 4th 431, 435 n.3, 104 Cal. Rptr. 2d 670, 673 n.3 (2001). The court discussed California Code of Civil Procedure section 410.30(a) which states, "[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." CAL. CIV. PRO. CODE § 410.30(a) (West 1973).

283. 54 Cal. 3d 744 (1991).

284. See *Shiley*, 4 Cal App. 4th at 132; see also *Stangvik*, 54 Cal. 3d at 752 ("[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff [citations]. Because of . . . [this] factor, the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state [citations]." (alterations and omission in original) (quoting CAL. CIV. PRO. CODE § 410.30(a) cmt. at 492)).

obtained there against the defendant.”²⁸⁵ The suitability requirement is met if a suit “can be brought,”²⁸⁶ regardless of whether it can be won.²⁸⁷ Simply stated, this requires two things: (1) that the alternate forum have jurisdiction over the defendant, and (2) that there be no statute of limitations bar against the plaintiff’s suit in the alternate forum.²⁸⁸ As in the federal arena, defendants have extensive control over this issue because they can satisfy the suitability requirement by stipulating to both—submitting to the alternate forum’s jurisdiction and revoking the right to raise a defense under the statute of limitations.

One of the requirements of a suitable forum is that the defendant be subject to jurisdiction there. In the case of multiple defendants, however, whether this means that *every* defendant must be subject to jurisdiction in the *same* forum is a context specific determination.²⁸⁹ In finding that a suitable forum is one in which the plaintiff may sue “all the properly named defendants,”²⁹⁰ the court in *American Cemwood Corp. v. American Home Assurance Co.*²⁹¹ relied on the statutory language of the Judicial Council Comments to Section 410.30,²⁹² the policy interest in the convenience of a single forum for litigation, and numerous federal cases.²⁹³

California’s analysis is different from the federal version where dismissal favors a sister state as the alternate forum. Whereas *Piper* states that a forum is inadequate if it provides “no remedy at all,” this exception does not apply in the case of sister states in the United States.²⁹⁴ Since the “rare circumstances” that render a forum

285. *Stangvik*, 54 Cal. 3d at 752 n.3.

286. *Shiley*, 4 Cal. App. 4th at 132.

287. *Id.*

288. *See id.*

289. *Am. Cemwood Corp. v. Am. Home Assurance Co.*, 87 Cal. App. 4th 431, 439–40 (2001). The court contrasted the facts of the present case with those in *Hansen v. Owens-Corning Fiberglas Corp.*, 51 Cal. App. 4th 753, 59 Cal. Rptr. 2d 229 (1996).

290. *Am. Cemwood Corp.*, 87 Cal. App. 4th at 437.

291. *Id.*

292. *Id.* The court discussed the Judicial Council of California comment, stating “[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff [citations].” *Id.* (alterations in original) (emphasis added).

293. *Id.* at 438.

294. *Shiley Inc. v. Superior Court*, 4 Cal. App. 4th 126, 134 (1992).

inadequate do not exist in U.S. courtrooms, neither state nor federal, every forum in the U.S. will provide some form of relief.²⁹⁵ None of the fifty states resembles a jurisdiction like the one that *Piper* used to illustrate the exception.²⁹⁶ Anything short of a despot governed state, with a corrupt judiciary and no concept of due process, will not disqualify that alternate state court as inadequate.²⁹⁷ The California courts, like the federal courts, treat the availability of an alternate forum as a threshold question. The court will move on to balance the convenience factors only if the first prong is satisfied. For the second prong, California courts balance the private and public convenience factors in a way that is identical to the court in *Piper*.²⁹⁸

In California courts, the threshold question regarding the availability of an adequate alternate forum is a "nondiscretionary determination by the trial court."²⁹⁹ As such, it is a question of law that the reviewing court will consider de novo.³⁰⁰ In the context of balancing the convenience factors, however, the reviewing courts apply an abuse of discretion standard.³⁰¹

California courts regard nonresident plaintiffs who are forum shopping in California with a certain degree of hostility. The court in *Shiley Inc. v. Superior Court*³⁰² stated that the plaintiff needs no guarantee of a remedy or recognition of a viable cause of action.³⁰³ Rather, the precept that laws are subject to change lays the responsibility at the plaintiff's feet; forum shopping plaintiffs should bear the burden of convincing their home forums to recognize the cause of action.³⁰⁴

295. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (noting that dismissal is inappropriate where the alternate "forum does not permit litigation of the subject matter of the dispute").

296. *Shiley*, 4 Cal. App. 4th at 133-34; see *Piper*, 454 U.S. at 254 n.22.

297. *Shiley*, 4 Cal. App. 4th at 133-34; see *Piper*, 454 U.S. at 254 n.22.

298. *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991).

299. *Shiley*, 4 Cal. App. 4th at 131.

300. *Am. Cemwood Corp. v. Am. Home Assurance Co.*, 87 Cal. App. 4th 431, 436 (2001).

301. *Id.* at 436 n.4.

302. 4 Cal. App. 4th 126 (1992).

303. *Id.* at 134-35.

304. *Id.* at 134.

5. Alien Tort Claims Act: human rights cases stand alone in the wake of forum non conveniens analysis

The Alien Tort Claims Act ("ATCA") grants U.S. courts jurisdiction to remedy certain violations of international law occurring abroad. After its adoption as part of the original Judiciary Act in 1789, the Act's subsequent history suggests a U.S. policy interest in exercising the jurisdiction granted by that act.³⁰⁵ In the two centuries following its inception, the Act was utilized to grant jurisdiction in only a few cases.³⁰⁶ In recent years, however, the number of litigants seeking redress under the ATCA has grown along with increased global concern for human rights issues.³⁰⁷ In a leading case, *Filartiga v. Pena-Irala*,³⁰⁸ the Second Circuit held that deliberate acts of "torture perpetrated under the color of official authority violate[] universally accepted norms of international human rights law," and consequently, qualify as a violation of U.S. domestic laws.³⁰⁹ Fifteen years later, the same court expanded the jurisdiction of the ATCA to include private actions in violation of applicable human rights laws and private actions colored by state authority.³¹⁰ The court's decision in *Filartiga* was later ratified when Congress passed the 1991 Torture Victim Prevention Act ("TVPA").³¹¹ The Act made it clear that any foreign nation engaged in torture or "extrajudicial killing" of foreign or domestic citizens would be liable under U.S. law.³¹² The TVPA supplemented the ATCA, explicitly

305. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000).

306. *Id.* at 104.

307. *Id.*; see, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging that Ethiopian prisoners were tortured); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (alleging torture, rape, and other abuses devised by a Serbian military leader); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by the former president of the Philippines); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (alleging claims against Libya regarding armed attack upon civilian bus in Israel); *Filartiga v. Pena-Irala*, 630 F.2d 876 (1995) (alleging torture by Paraguayan officials); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (alleging abuses by Guatemalan military forces).

308. 630 F.2d 876 (1995).

309. *Wiwa*, 226 F.3d at 104 (citing *Filartiga*, 630 F.2d at 880, 884-86).

310. *Id.*

311. 28 U.S.C. § 1350 (2000).

312. *Id.*

recognizing that the "law of nations is incorporated into the law of the United States."³¹³

In light of the TVPA's enactment and recent history, plaintiffs currently have a strong argument that claims of torture under the ATCA are not only permitted in U.S. district courts, but fall within the policy interests of the United States to eliminate torture committed abroad under the color of a foreign nation's law.³¹⁴ Although dismissal under *forum non conveniens* is not an issue unless the defendant shows that an adequate alternate forum is available,³¹⁵ dismissal of a torture case places a colossal burden on the plaintiff.³¹⁶

Bringing the suit itself is the first of many "enormous difficulties" faced by a victim of torture committed under the color of foreign national law.³¹⁷ Most victims would be endangered by simply reentering the country where the torture took place, so the courts of that nation are eliminated as potential forums for the suit.³¹⁸ It is also difficult to bring such a suit in the courts of a different country.³¹⁹ Administering these suits is time consuming and burdensome, thus making most countries "inhospitable" to plaintiffs in search of a forum.³²⁰ Furthermore, the forum hearing the suit risks the embarrassment of entertaining "outrageous" allegations against other nations.³²¹ As a result, most courts adopt the attitude that such suits are "not our business."³²²

The TVPA makes acts of torture committed under the color of a nation's law "our business."³²³ Such conduct violates U.S. domestic

313. *Wiwa*, 226 F.3d at 105. The court stated that the purposes of TVPA were to codify *Filartiga*, lessen concerns regarding separation of powers, and expand the ATCA's protection to include U.S. citizens as potential claimants. *Id.*

314. *Id.*

315. *See id.* at 106.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* *See also* Short, *supra* note 1, at 1025-26. Short shows concern for the "profound impact" that the Second Circuit's decision in *Wiwa*, if followed by other courts, will have on "dismantling" *forum non conveniens* in the federal courts. He introduces the three arguments that *Wiwa* makes in support

law because it violates “standards of international law.”³²⁴ In passing the TVPA, Congress communicated a policy favoring jurisdiction over such cases.³²⁵ In deliberating the TVPA, Congress reasoned that universal condemnation of egregious violations of human rights affords nothing more than superficial comfort to a torture victim who has nowhere to bring suit.³²⁶ This does not mean that the policy favoring adjudication of such claims in the United States nullifies forum non conveniens.³²⁷ Rather, when a court balances the relative burdens to the parties and the forum under the second prong, this policy is simply inserted as a factor.³²⁸ Dismissal is still appropriate, however, if the defendant fully satisfies her burden by showing both that an adequate alternative forum is available and that the convenience factors strongly favor dismissal.³²⁹

6. The future of cases dismissed under forum non conveniens

Professor David R. Robertson conducted a survey of eighty-five dismissals granted on forum non conveniens grounds in the American and British courts between 1949 and 1987.³³⁰ Fifty-five of

of immunizing ATCA claims from forum non conveniens analysis; he then moves on to critically evaluate them for the next fifty-five pages. *Id.* at 1026–81.

324. *Wiwa*, 226 F.3d at 106.

325. *See id.*; *see also* Short, *supra* note 1, at 1078. Short argues that the Second Circuit’s decision in *Wiwa* to recognize a “new U.S. policy interest” in hearing ATCA claims resulted in the “de facto abolition of forum non conveniens in virtually all human rights cases,” at least in that circuit. *Id.* He maintains that this “unprecedented approach . . . undermine[s] . . . forum non conveniens in human rights cases.” *Id.* at 1073. Short argues that the Second Circuit attempted to abolish forum non conveniens in human rights cases with its decision in *Wiwa*. *Id.* Furthermore, he maintains that the court’s efforts “go too far [and] . . . unnecessarily . . . tie the hands of the federal judges” when dismissal would otherwise be proper under the doctrine. *Id.*

326. *Wiwa*, 226 F.3d at 106.

327. *Id.*

328. *See id.* at 107–08.

329. *Id.* at 108.

330. *See* Michael Sang H. Cho, Comment, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade*, 27 ST. MARY’S L.J. 817, 843 n.117 (1996); David R. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. REV. 398, 409 (1987).

those cases were personal injury and the other thirty were commercial cases.³³¹ Of the eighty-five dismissed cases, only three resulted in a judgment in a foreign court.³³² One personal injury and two commercial cases actually reached trial.³³³

Only four percent of cases dismissed under *forum non conveniens* reach the alternate forums for which the dismissing courts intended them.³³⁴ “[T]he courts have taken refuge in a euphemistic vocabulary, one that glosses over the harsh fact that such dismissal is outcome-determination in a high percentage of the *forum non conveniens* cases”³³⁵ Furthermore, in some instances, the limitations on litigation in the alternate forum are so severe³³⁶ that a court dismissing a case under *forum non conveniens*, “in reality, [guarantees] a complete victory for the defendant.”³³⁷

D. Conclusion

Some commentators feel that foreign plaintiffs are drawn to U.S. courts like moths to a flame.³³⁸ Indeed, the benefits of litigating in U.S. courts make them attractive forums for foreign plaintiffs seeking redress, often regardless of the inconvenience posed by litigating abroad. In light of the potential influx of cases, U.S. courts have created a way to filter them by refusing to exercise the jurisdiction that the courts have over the cases. The balancing scheme that the United States Supreme Court introduced in *Gilbert*

331. Cho, *supra* note 330, at 843 n.117.

332. *Leon v. Millon Air Inc.*, 251 F.3d 1305, 1313 n.2 (2001) (*forum non conveniens* dismissals) (citing Robertson, *supra* note 330, at 419).

333. Cho, *supra* note 330, at 843 n.117 (citing Robertson, *supra* note 330, at 409).

334. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (citing Robertson, *supra* note 330, at 419).

335. *Id.* (Doggett, J., concurring) (quoting Robertson, *supra* note 330, at 409).

336. *Id.* (Doggett, J., concurring). The court stated, “In some instances, . . . invocation of the doctrine will send the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood that the case will be tried. When it is obvious that this will occur, discussion of convenience of witnesses takes on a Kafkaesque quality—everyone knows that no witnesses ever will be called to testify.” *Irish Nat’l Ins. Co. v. Aer Lingus Teroanta*, 739 F.2d 90, 91 (2d Cir. 1984).

337. *Dow Chem.*, 786 S.W.2d at 683 (Doggett, J., concurring).

338. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 473 (2001).

and *Koster* gave courts a practical set of instructions to follow when considering a motion to dismiss under the common law doctrine of forum non conveniens. The doctrine was still unclear, however, until the Court crystallized the two prong test in *Piper*. Since then, courts have applied the doctrine to a variety of fact patterns and causes of action, and though their analyses focus on the principles of justice and convenience, their results are often varied and unpredictable.³³⁹ Justice dictates that the plaintiffs have an available forum to hear their grievances. On the other hand, justice would not be served if the plaintiff's choice of forum subjected the defendant to undue burdens or posed practical and administrative problems for the chosen court. As such, the definition of justice is not so clear. It depends on the facts of each case, the interests of the parties, and the interests of the jurisdictions involved. Courts use a convenient brand of justice when considering a motion to dismiss under forum non conveniens. The result is a highly malleable doctrine that operates like a set of guidelines rather than fixed rules.

339. For further discussion on the inconsistent application of the doctrine of forum non conveniens, see Reed *supra* note 6, at 105. The “unfettered judicial discretion” that American courts use in determining forum non conveniens dismissals create a “crazy quilt of ad hoc, capricious and inconsistent decisions” that leave plaintiffs with little guidance and often a result that is contrary to the underlying principles of the doctrine – justice and convenience. *Id.* (quoting Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985)).

